**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE**

**THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929**

**WP(C).No. 36066 of 2004(R)**
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**OS.12/2001 OF SUB COURT, THIRUVALLA**
**.....**

**PETITIONER:**
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**RAGHUNATHAN, CHEMMARAPPALLIL VEEDU,**
**KALATHOOR ADUBHAGOM MURI, KOTTANGAL VILLAGE,**
**MALAPPALLY TALUK.**

**BY ADV. SRI.CHERIAN GEE VARGHESE**
**SRI.S.VENKATASUBRAMONIA IYER(SR.)**
**SRI.P.HARIDAS**

**RESPONDENTS:**
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**KALLOOPPARA GRAMA APANCHAYATH**
**REPRESENTED BY ITS SECRETARY, KALLOOPPARA.**

**BY ADV. SRI.LALJI P.THOMAS**
**SRI.T.R.RAMAN PILLAI(SR.)**
**SRI.LALJI P.THOMAS**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**WP(C) NO: 36066/2004**

**APPENDIX**

**PETITIONER'S EXHIBITS**

**EXT.P1. COPY OF THE AGREEMENT DT. 18/4/2000.**

**EXT.P1A. COPY OF THE AGREEMENT DT. 18/4/00.**

**EXT.P2 AND P2A . COPY OF THE AFFIDAVIT AND PETITION IN IA NO. 1106/2004 IN OS NO. 12/2001 OF SUB COURT, THIRUVALLA DT. 6/12/2004.**

**EXT.P3. COPY OF THE ORDER IN IA NO. 1106/2004 DT. 6/12/2004 OF THE SUB COURT, THIRUVALLA.**

**EXT.P4. COPY OF THE ORDER OF THE SUB JUDGE, THIRUVALLA DT. 07/12/2004 IN OS NO. 12/2001.**

**RESPONDENT'S EXHIBITS** **NIL.**

*True copy*

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**PIUS C. KURIAKOSE, J.**

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W.P.(C)No.36066 OF 2004

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DATED THIS THE 25th JULY, 2007

**J U D G M E N T**

The admissibility of Exts.P1 and P1(a) agreements as evidence in a suit for recovery of money filed by the respondent-Panchayat against the petitioner who was the purchaser-in-auction of the right for removing sand from Manimala river is the question which arises for consideration in this Writ Petition under Article 227 of the Constitution.

2. Ext.P4 is the order under which the learned Subordinate Judge overruled the objections raised by the petitioner-defendant to the marking of the documents when they were put in evidence and permitted marking of Exts.P1 and P1(a) as Exts.A1 and A2 respectively. The petitioner also challenges Ext.P3 order under which the learned Subordinate Judge dismissed an application filed by the petitioner for amendment of the written statement so as to incorporate a specific contention that Exts.P1 and P1(a), the suit-agreements being compulsorily registrable documents are void and unenforceable in law.

3. I have heard the submissions of Sri.S.Venkitasubramonia Iyer, Senior Advocate for the petitioner and also those of Sri.T.R.Harikumar, Advocate for the respondent.

4. Drawing my attention to the full text of Exts.P1 and P1(a),

the learned Senior Counsel would submit that both those agreements pertain to extraction of river sand from the bed and banks of Manimala river during the period from 18.4.2000 to 31.3.2001 and that under those agreements, the right for such extraction is given to the petitioner respectively for Rs.18,00,200/- and Rs.7,00,001/-. The right to purchase by the petitioner under Exts.P1 and P1(a) from the respondent-Panchayat is profit a prendre. The said right in contrast to a mere easement is immovable property, the value of which is concededly more than Rs.100/-. My attention was drawn by the learned Senior Counsel to Section 17(1)(d) of the Registration Act and also to Section 49(c) of the same Statute and it was contended that since both Exts.P1 and P1(a) are unregistered documents, the learned Subordinate Judge should not have allowed marking of those documents. Black's Law Dictionary as well as the judgment of the Supreme Court in **Ananda Behera v. State of Orissa** (AIR 1956 SC 17) were relied on by him to fortify his submission that the right conferred under Exts.P1 and P1(a) is profit a prendre and hence immovable property. The judgment of a Division Bench of this Court in **Chandrakala v. Soman** (2004 (3) KLT 432) and that of another Division Bench, to which I was also a party, in **Paul v. Saleena** (2004

(1) KLT 924) were relied on by the learned Senior Counsel to support his argument that documents which are compulsorily registrable are not admissible in evidence. The learned Senior Counsel would flay both the impugned orders and particularly Ext.P4 which, according to him, has been issued by the learned Sub Judge in a very casual manner even without bothering to appreciate the ratio of the Supreme Court decisions which were cited before the learned Judge.

5. The learned counsel for the respondent per contra would support Exts.P3 and P4 on the reasons stated in those orders themselves. The petitioner does not have to be aggrieved by Ext.P3 since the issue has been decided under Ext.P4, according to the learned counsel. Exts.P1 and P1(a) are not compulsorily registrable documents and hence the learned Subordinate Judge was justified in permitting marking of those documents, submitted counsel.

6. I do find considerable merit in the submission of the learned senior counsel that the right which is seen purchased by the writ petitioner from the respondent Panchayat under Exts.P1 and P1(a) is profit a pendre which going by Black's Law Dictionary and by judgment of the Supreme Court in Ananda Behera's case is immovable property and that by virtue of Sections 17(1)(d) and 49 of the Registration Act

Exts.P1 and P1(a) cannot be relied on as evidence of any transaction affecting the profit a pendre since the same is not registered. But at the same time it should not be forgotten that section 49 of the Registration Act is subject to the proviso that an unregistered document affecting immovable property and required by the Registration Act or Transfer of Property Act to be registered can be received as "evidence of any collateral transaction not required to be effected by registered instrument".

6. Under Ext.P1, the learned Subordinate Judge appears to have taken the view that the documents Exts.P1 and P1(a) do not create any right or interest over the immovable property, but only creates "right to take sand from a river for a period of one year". The view of the learned Subordinate Judge runs contrary to law laid down by the Supreme Court in AIR 1956 SC 17 and the view I have taken herein before. The above view is held to be erroneous. At the same time I do not propse to set aside the ultimate order permitting marking of the documents as A1 and A2 since marking of a document will not amount to admitting the document as evidence in the case. It is clarified that the effect of Ext.P4 order is only to assign numbers to the document so as to enable the court below and the superior courts

(in the event of any appeals or revisions against the orders and judgments to be passed by the court below) to peruse document and consider whether the document is admissible in evidence at least for the purpose of proving collateral transactions coming within the purview of section 49 of the Registration Act. The evidentiary value of the documents marked under Ext.P4 as A1 and A2 will be assessed by the court below at the time of appreciation of the evidence in the case for the purpose of deciding the suit only in the light of the principles laid down by the Supreme Court in AIR 1956 SC 17 and my own observations in this judgment that the right to collect sand being profit a pendre is immovable property.

The writ petition is allowed to the above extent.

**(PIUS C.KURIAKOSE, JUDGE)**

ksv/20208